No. 2409.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. STERN, et al., etc.,

Appellants,

vs.

CARLOTTA C. FERNANDEZ, et al., etc.,

Appellees.

Brief for Appellees.

H. W. HUTTON,
Proctor for Appellees.

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F. D. MONCKTON, Clerk.

By....., Deputy Clerk.

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BRIEF FOR APPELLEES.

In this case B. Fernandez owned the scow Frances E. M. Bernard, and on or about October 17th, 1904, there was placed on board of her on a branch of the Sacramento River called Minor's Slough, a number of sacks of beans, which for the purposes of this brief we will assume was 1008 sacks, weighing on an average 85 pounds per sack (p. 29), or 42.8 tons. 125 sacks or 5.62 tons were stowed down below and the remainder, 37.18 tons, on deck, and she was properly loaded (pp. 56, 78).

There is no question she was in good condition and

properly manned, leaving Minor's Slough, it appearing that she was loaded at about its mouth, and entering another water about 150 feet wide called Cache Creek the wind suddenly changed and she sheered over to the opposite bank, in spite of the efforts of the captain to prevent it (pp. 78, 81, 89, 90, 98, 101), and struck a snag in the bank and sheered off (pp. 78, 93, 100, 101, 102), the snag made a hole in the vessel, she got water in her, overturned and the beans were lost.

More than a year afterwards, Nov. 13th, 1905, libelants filed a libel, praying for damages, defendant appeared without the service of a citation and Dec. 8th, 1905, served and filed exceptions to the libel (p. 9), the exceptions were not brought on for hearing, and, B. Fernandez having died on the 12th day of May, 1912, appellees made a motion October 12th, 1912, asking to be substituted as respondents and that the libel be dismissed for laches. (Pp. 9 to 15) the motion to dismiss was denied, the motion to substitute granted (p. 15), the exceptions to the libel were overruled Nov. 11th, 1912. Defendants answered, the case was tried and the libel dismissed.

ARGUMENT.

I.

This vessel having the cargo of but one owner on board on a specific voyage was not a common carrier, but a mere private carrier carrying out the ordinary obligations of a bailee under a compensated bailment, and was held to ordinary care alone.

Sumner v. *Caswell,* 20 Fed., 249.

It is very clear that if the vessel had not struck the snag, water would not have entered her hold and the beans would not have been lost. Was the snag a peril of the sea, or the striking of it an unavoidable accident?

What is a peril of the sea?

Sec. 2199, Civil Code, which is in accordance with the Maritime Law, defines perils of the sea applicable to this case as follows:

"Sec. 2199. Perils of the sea are from:
"2. Rocks, shoals and rapids.
"3. *Other obstacles,* though of human origin.
"7. All other dangers peculiar to the sea."

In the case of *Hibernia Ins. Co.* v. *St. Louis & New Orleans Trans. Co.,* 17 Fed., 478, a tow-boat started on a voyage with two barges in tow, one of the barges struck on a sand bar that had been recently formed, and it was held there was no fault, the other barge, the Colossal, *was unseaworthy* when she started, she

struck a sunken tree in about the same manner that the scow in question here did, and it was held that the accident was inevitable and there was no fault. The case was appealed and affirmed by the United States Supreme Court in

Same case on appeal, 120 U. S., 166.

If the change of wind is a usual, an ordinary incident of the voyage the Frances E. M. Bernard started to make in this case, it is clear that the hidden snag was not, as the master could not see it (p. 93).

"Q. How do you know there was a snag, or anything at the bank?
"A. I did not know there was a snag.
"Q. How did you know afterwards; did you ever go and examine the place?
"A. I did not.
"Q. You are just guessing?
"A. By the hole in the schooner there must have been a snag, because Cache River is deep from bank to bank.
"Q. How high up was the hole in her, if you know?
"A. It was in the side, sir.
"Q. How far below her rail?
"A. She was just about four, five or six inches below the water-line; that is, below the water."

The obstacle, whatever it was, was thus below the water, unobservable, a hard substance (p. 101).

"Q. What can you say as to that hole; was it made by striking a soft or hard substance?
"A. A hard substance.

"Q. That is the result you think? It would be caused by striking a snag, some hard substance?
"A. Yes, sir."

So we have the case of a vessel starting on a voyage, before the sails are set and she has way on her, the wind suddenly changes—of course Ewald, the master, had no control over the wind—the vessel took a sheer, as any vessel is likely to do, he did everything he could to stop the sheer but was unable to; the vessel struck a snag that could not be seen, knocked a hole in her, water must have run in her unless the laws of nature were reversed in this case, as it is clear water will run through a hole if the hole is below its surface; it ran into the vessel's hold, destroying her stability, and she overturned. It is impossible to present a clearer case of inevitable accident.

II.

EWALD WAS COMPETENT.

Appellants' argument on the competency of Ewald is based upon the proposition that it was his first trip as master. If that argument is sound, all captains are incompetent on their first trip, all lawyers are incompetent on the trial of their first case, and in all lines of business a man must be incompetent the first time he fills any position. Appellants have not told us, however, how many trips a master would have to make before he became competent. If a master of a ship is incompetent on his first trip a Chief Engineer

must be also, and stay incompetent until the period arrives—but just when it would arrive appellants have not told us—that he becomes competent. If that was the law the present masters of vessels would have a monopoly, as no ship-owner would dare to make new captains, chief or other engineers, etc.

Ewald had been on this vessel at least two years. He evidently knew all about her—he had been there long enough.

All the testimony is that he was competent (p. 36). On pages 76 and 77 it appears that he had been captain on four scows. It is true that it was after this accident; but Tietjen appointed him master on the Rough & Ready, apparently, immediately afterwards. Then he worked for other people as master (p. 95). He worked for Tietjen two years as master (p. 48). Tietjen certainly knew something about him.

All the testimony and the facts showing that he was competent, as counsel is unable to point out anything that Ewald should have done that he did not do or point out anything that he did at that time that he ought not to have done, we are led simply to the proposition that appellants wish proven facts to be set aside by shadowy inferences. Tietjen had made inquiries about Ewald before he appointed him (pp. 44, 45).

III.

THE VESSEL WAS PROPERLY LOADED.

This vessel had a carrying capacity of 50 tons (pp. 38 and 41). On this trip she had but 42.8 on board, with 5.62 tons down below. Tietjen testified she had carried 50 tons, with 45 on deck and 5 down below, and his testimony is not hearsay, as he testifies, page 41:

> "A. I was there when she took in 5 tons, I asked him if that was all she required and he said yes."

Tietjen had been agent of the vessel 8 years, he had known her many more years. He testified (p. 38) that the Frances E. M. Bernard was properly loaded at the time in question, also on page 56. Ewald testified (p. 78):

> "Q. Was she loaded properly at that time?
> "A. She was. She was in good trim.
> "Q. The usual way of loading cargo of that kind?
> "A. Exactly."

It is in evidence also that this vessel was very wide and shallow (pp. 38, 39, 40). She was about 18 feet wide and only 54 long, one-third as wide as she was in length.

Unseaworthiness in a vessel must be a contributing cause of the damage to be considered. There is not even that in this case, as there is nothing to show that

the vessel was improperly loaded. On the contrary, all the testimony is the other way; and again, if she was not properly loaded there is nothing to show that caused the vessel to turn over. It was the water in her hold. She would have turned over in any event, loaded properly, improperly, or empty, with a hole in her side or with water in her (pp. 65-75).

As to the testimony of Erickson, it is of no value in this case. On the whole, however, we think it supports the defense.

IV.

FINDINGS OF THE COURT.

The trial Court heard all of the witnesses but one testify. All the testimony seems to be one way, there is not even a conflict and the trial Court found (p. 106):

> "Respondents claim that the loss was due to perils of navigation and that the 'Bernard' was in all respects properly fitted and manned. The testimony of respondents' witnesses support in every respect their claim. . . ."

We are certain that everything in the record justifies that finding.

V.

THE LIBEL SHOULD HAVE BEEN DISMISSED FOR LACHES.

The libel was filed Nov. 13th, 1905. The exceptions were filed Dec. 9th, 1905 (pp. 8 and 9). The exceptions were well taken as there was no averment in the original libel that Respondent Fernandez was in any way responsible for the damage claimed. All it shows is that the libelants had made a demand on him for payment and he had refused to pay. November 1st, 1913, amendments to the libel were filed; but from Dec. 9th, 1905, to October 7th, 1912, almost 7 years, and over 8 years from the time of the vessel's turning over, not a thing further was done by libelants. In the meantime respondent had died.

The Court denied the motion to dismiss upon the authority of

The Mariel, 6 Fed. Rep., 831.

That case was different to this and not near as much time had elapsed; in that case issue had been joined. The Court in that case, however, said that it denied the motion to dismiss, as that had been the practice of that Court, although other Courts had construed the same rule differently. The rules reading:

> "136. If the promovent in a libel or information neglects to proceed in the cause with the dispatch the course of the Court demands, the respondent or claimant may have the libel or in-

formation dismissed on motion, unless the delay is by order of the judge, or the act of the respondent.

"123. So soon as issue is joined the respondent or claimant may notice a cause for hearing on his part and be thereupon entitled to a decree dismissing the same with costs or such other decree as the case may demand unless the libelant shall also notice the cause for the same time and proceed to trial, or obtain a continuance by order of the court on proper cause shown."

Those two rules refer to a case after issue is joined, *on exceptions,* the following rules of the District Court apply:

"Rule 94. DEMURRER. The defendant may on the return day of process, and before answering, demurring, or pleading, file an exception to the libel that it is multifarious or ambiguous, or without plain allegations upon which issue can be taken, and if it be adjudged by the Court insufficient for any of these causes, and be not amended by the libelant within two days thereafter, it shall be dismissed with costs.

"Rule 95. Proceedings upon such exceptions shall conform to those on exceptions to answers or other pleadings.

"Rule 96. INSUFFICIENCY. The libelant may within four days from the filing of the answer or claim, file exceptions thereto for insufficiency, irrelevancy, or scandal, which exceptions shall briefly and clearly specify the parts excepted to by line and page of the papers in the Clerk's office; whereupon the party answering or claiming *shall in four days either give notice to the libelant of his submitting to the exceptions* or set down the exceptions for hearing, and give four days notice thereof for the earliest day of jurisdiction after-

ward. In default whereof, the like order may be entered as if the exceptions had been allowed by the Court."

The record shows that the exceptions were served on the proctors for libelant on the 8th day of December, 1905, and filed on the next day. It was the duty of libelants to give notice within four days of submitting to the exceptions or set them down for hearing. Failing to do so, the exceptions stood as if allowed by the Court, and libelant was bound to amend within two days, or the libel was subject to dismissal.

Whatever time elapsed over that was merely an accommodation given by defendant to libelant, but defendant lost no rights by it.

LIBELANTS' BRIEF.

In the case of *The G. R. Booth,* 171 U. S., 450, it appears that one part of the cargo exploded. That was undoubtedly due to either the dangerous character of that cargo or an inherent defect in it, and of course in no way related to the elements, sea, storms, rocks or shoals, or any natural cause.

A change of wind is beyond human control. The wind in this case suddenly changed from *the west* to *the northwest.* The master did everything he could do to overcome the effect of the change but was unable to, and if it had not been for the snag there would

have been no damage. The "Bernard" steered just as well as any other scow (pp. 101-102).

"Q. Did she steer as well as the average scow would steer?

"A. Like any other boat.

"Q. You stated she would not answer her helm?

"A. There are times they will act contrary. Many times yet get in a tide rip and a scow will not handle.

"That is caused by the tide rip?

"A. She must be a very sharp vessel, and a change of wind will affect the vessel."

This vessel was built in 1865. It does not appear that she had ever been in trouble before. The channel was narrow in this case; wide enough to sail straight in, but with little room to maneuver in. It does not appear to have been an unusual thing for scows to strike the bank (p. 75) and changes of wind also affect a vessel.

Page 56.

"Q. With respect to a scow or these river vessels, or any sailing vessel, when they get in the river where they are liable to get a puff of wind from among the trees, or around there, what effect does it have on them?

"A. You have to manage them quick; sometimes you cannot do it, there is not room enough.

"Q. Is not that the case with all sailing vessels, whether they are scow schooners or ocean vessels or anything else.

"A. Yes, but especially on the Sacramento River, because you have not much time there.

Page 57.

"Q. Supposing the wind changes quickly; Captain, can you always hold her then?

"A. No; that is just where it comes in; when the wind is quick sometimes she comes back and jibes over quick.

"Q. Did you ever see the rudder on the 'Bernard'?

Page 58.

"A. Yes.

"Q. Was it a small rudder or a large rudder or an average rudder.

"A. It was a good, large rudder for her."

Libelants' brief does not clearly show their position. There is no denial that the vessel received a wound under water; water must have run in the hold. No vessel has ever yet been known to successfully make a voyage with a hole in her side through which water runs. As soon as the master found that she had received some injury he tried to do the only thing he could do, get her over to the other side and beach her. There is no proof to show that was not the proper thing to do. He did the best he could, and while doing the proper thing the vessel overturned. The fact that she overturned within five or any other number of minutes simply shows that the extent of the injury was sufficient to overcome the stability of the vessel at the moment she overturned. If the injury had been greater she would have overturned quicker.

If it had not been as great, she would not have lost her stability so soon. It is simply a question of cause, and the time when the effect relatively happened.

We submit that all B. Fernandez was held to was ordinary care, he was not an insurer; that this was an inevitable accident and no fault can be attributed to any one, and that the libel was properly dismissed on the merits and should have been dismissed on the motion praying for a dismissal.

Respectfully.

H. W. HUTTON,
Proctor for Appellees.